Nos. 90-711 and 90-712

In the Supreme Court of the United States

OCTOBER TERM, 1990

LAWRENCE C. PRESLEY, ETC., APPELLANT

v.

ETOWAH COUNTY COMMISSION, ET AL.

ED PETER MACK, ET AL., APPELLANTS

v.

RUSSELL COUNTY COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The ultimate question presented in both cases is whether a transfer of decisionmaking authority from one elected official or set of officials to another official or set of officials is a "change with respect to voting" covered by Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, regardless of whether the officials serve the same or different voting constituencies and regardless of whether the transferred authority is more or less important than other duties of the office.

1. In No. 90-711, the specific question is whether a county commission's decision to transfer authority to determine road work priorities from individual commissioners elected from single-member districts to the entire commission is a change "with respect to voting" under Section 5.

2. In No. 90-712, the specific question is whether a State's transfer of road work authority from county commissioners elected at large from residency districts to a county engineer appointed by the commission is a change "with respect to voting" under Section 5.

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States in these cases.

STATEMENT

1. On November 1, 1964 (the date Section 5 of the Voting Rights Act of 1965 became applicable to appellees, see 42 U.S.C. 1973b(b)), the Etowah County Commission consisted of five members: four

commissioners elected at large but required to reside in separate "residency districts," and a chairman elected at large. J.S. App. A4.[1] The four commissioners each exercised complete control over a road shop, crew, and equipment in their residency district. *Ibid.* Road funds were allocated to each district based on projected need. *Ibid.* The four "road commissioners" individually determined work priorities in their own districts. *Ibid.*

In 1986, the Commission entered into a consent decree resolving litigation under Section 2 of the Voting Rights Act. J.S. App. A4-A5. The decree expanded the Commission to six members, all of whom eventually would be elected from single-member districts. *Id.* at A5. Two commissioners were elected from single-member districts in December 1986. Appellant Presley, the first black commissioner of Etowah County in recent history, is one of these two. *Ibid.* Under the decree, two of the at-large holdovers ran from districts and were elected in 1988, and two were to run from districts in 1990. *Ibid.*

The consent decree specified that the commissioners elected in 1986 were to have the same duties as the four holdovers. J.S. App. A5. In August 1987, however, the Commission passed a resolution providing that each of the four holdovers would continue to exercise authority over road operations in their districts. *Ibid.* The resolution further provided that the "old four" would oversee road work throughout Etowah County. *Id.* at A5-A6. The resolution assigned non-road duties to the two new commissioners.

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[1] The district court's opinion is reproduced in the appendices to the Jurisdictional Statements in both No. 90-711 and No. 90-712; references herein to "J.S. App." may be found in the appendix to either filing.

Id. at A6. The effect of the resolution was to strip the two new commissioners of any supervisory authority over road operations. Not surprisingly, this "road supervision" resolution was passed by a vote of four to two, over the opposition of the two new commissioners. *Id.* at A5.

On the same day, the Commission adopted a second resolution by an identical vote of four to two. J.S. App. A6-A7. This resolution abolished the practice of allocating road funds to districts. Instead, the resolution provided that road funds would be retained in a common fund for use without regard to district lines. *Id.* at A6. The effect of this "common fund" resolution was to eliminate the authority of individual commissioners to determine funding priorities in their districts. *Id.* at A7.

2. On November 1, 1964, the Russell County Commission consisted of three members elected at large from residency districts. J.S. App. A2. In 1972, as a result of a court order to comply with the one person, one vote rule, the Commission was expanded to five members. A fourth residency district consisting of Phenix City was created, and two commissioners were required to reside there. *Ibid.*

Under this system, each of the three rural commissioners had authority over his own road shop. J.S. App. A2. (Municipal roads in Phenix City generally are not funded or maintained by the county. See *id.* at A2 n.2.) The three rural commissioners each set road work priorities, bought equipment, and hired and managed personnel within their own districts. *Id.* at A2-A3. Each commissioner also approved funding for routine work. *Id.* at A3. Funding for new or major construction, however, required Commission approval. *Id.* at A3 n.3.

A county engineer, appointed by the Commission, assisted the road commissioners in carrying out their responsibilities. *Id.* at A3.

After an investigation uncovered corruption in Russell County's road operations, the Alabama legislature enacted in 1979 a statute transferring all responsibility for road work to the county engineer. J.S. App. A3. The statute requires the engineer to perform road work without regard to district lines, thereby establishing what is known as a "unit system." *Ibid.*

In 1985, the Commission entered into a consent decree to resolve litigation under Section 2 of the Voting Rights Act. J.S. App. A4. Under the decree, the Commission was expanded to seven members, each elected from a single-member district. *Ibid.* Appellants Mack and Gosha were elected to office under this system in 1986, and became the first two black commissioners in recent history. *Ibid.*

3. In 1989, appellants filed suit in federal district court alleging that the conduct of road operations in Etowah and Russell Counties violated previous court orders, the Fourteenth and Fifteenth Amendments, Title VI of the Civil Rights Act of 1964, and Section 2 of the Voting Rights Act. J.S. App. A7. Thereafter, appellants amended their complaint to allege that Russell County's failure to preclear its transfer of road authority to the county engineer, and Etowah County's failure to preclear the road supervision and common fund resolutions, violated Section 5 of the Voting Rights Act. *Ibid.* A three-judge court was convened to consider the Section 5 claims. J.S. App. A7-A8.

The court held that transfers of authority are subject to Section 5 preclearance when they "effect a significant relative change in the powers exercised

by governmental officials elected by, or responsible to, substantially different constituencies of voters." J.S. App. A13-A14. Since minority groups often have different levels of voting strength in different constituencies, the court explained, a transfer of authority from an official elected by one constituency to an official elected by another may have a potential for discrimination. *Ibid.* Such a potential is unlikely to exist, the court thought, when the officials are elected by the same constituency. *Ibid.* Even when officials with different constituencies are involved, the court added, "minor or inconsequential" transfers of authority do not have a "significant potential impact on voting rights." *Ibid.*

Applying these principles, the court concluded that Russell County's transfer of road supervision authority from the individual commissioners to the county engineer was not a change covered by Section 5, because both the commissioners and the engineer ultimately were answerable to the same constituency—the entire Russell County electorate. J.S. App. A16-A18. Although individual commissioners were required to reside in a particular district, the court explained, they "were elected by, and thus politically responsible to, all the voters of Russell County." *Id.* at A16. Similarly, the county engineer, although appointed, is responsible to the commission, and that body is responsible to all county voters. *Id.* at A16-A17.

The court also concluded that Etowah County's common fund resolution did not require preclearance. The court acknowledged that the common fund resolution transferred authority between officials with different constituencies. Before enactment of the resolution, individual commissioners elected from, or facing election from, single-member districts

could determine priorities for road repair in their own districts; afterwards, the entire commission had this authority. J.S. App. A18-A19. The court nonetheless concluded that this change did not affect voting, since the power to set internal priorities was "minor and inconsequential" compared to the entire commission's authority, both before and after the resolution, to determine the amount of money to be allocated to each district. *Id.* at A19.

In contrast, the district court held that Etowah County's road supervision resolution was covered by Section 5. J.S. App. A20-A21. The court concluded that "the potential for discrimination posed by this change is blatant and obvious." *Id.* at A20. The court explained that "[w]hereas before 1987 all the voters of Etowah County participated in choosing the commissioners responsible for road management, the 1987 resolution stripped the voters in [two] districts * * * of any electoral influence over such commissioners." *Ibid.* Thus, "[a]uthority over the most important aspect of county governance was shifted from officials responsible to the entire county to officials (albeit the same individuals) responsible to only two thirds of the county voters."[2] *Id.* at A20-A21.

Judge Thompson concurred in part and dissented in part. He agreed with the majority that Etowah County's road supervision resolution was subject to the preclearance requirement, but dissented from the court's determination that the common fund resolution did not require preclearance. J.S. App. A27-A33. In concluding that the power to set internal priorities is comparatively insignificant, Judge

[2] Etowah County subsequently repealed the road supervision resolution, and has not cross-appealed. Mot. to Aff. 2 n.3.

Thompson said, the majority ignored the realities of road operations in Etowah County. *Id.* at A32. The allocation of funds among districts "has never been a bone of contention." *Ibid.* Instead, a "commissioner's real authority lies * * * in how those funds are used after they are allocated." *Ibid.* In Judge Thompson's view, "[t]he common fund resolution, and the road supervision resolution, working together, took this authority away from the two new commissioners and gave it exclusively to the four holdover commissioners." *Ibid.*

Judge Thompson also dissented from the court's conclusion that Russell County's transfer of road authority from individual commissioners to the county engineer did not constitute a change affecting voting. J.S. App. A33-A35. According to Judge Thompson, the court's holding ignored the possibility that the commissioners might have been more accountable to voters in their residency districts than to those outside their districts. *Id.* at A34. More fundamentally, Judge Thompson disagreed with the majority's conclusion that transfers of authority are covered by Section 5 only when they occur between officials with different constituencies. J.S. App. A35-A36. The question whether there is a potential for discrimination, he thought, should not be decided on the basis of a rigid rule. *Id.* at A37-A38. If a limiting principle were required, Judge Thompson stated, he would find it sufficient for plaintiffs to show that "there has been a *significant* and *fundamental* change in the nature of the duties traditionally exercised by elected officials." *Id.* at A38.

DISCUSSION

The central question presented by these related appeals is under what circumstances a change in the decisionmaking authority of an elected official or set of officials constitutes a change in a "standard, practice, or procedure with respect to voting" requiring preclearance under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. In exercising its responsibilities under Section 5, the Department of Justice has long treated certain transfers of decisionmaking authority as changes "with respect to voting."[3] We have also taken that view in cases before this Court.[4] At the same time, the United States has argued, and this Court has indicated, that not all reallocations of authority are covered by Section 5. See *Rojas* v. *Victoria Indep. School Dist.*, Civ. A. No. V-87-16 (S.D. Tex. Mar. 29, 1988), summarily aff'd, 490 U.S. 1001 (1989). Thus far, no clear line has

[3] For example, the Department has objected to the following transfers of decisionmaking authority: (1) Mobile, Alabama (March 2, 1976), involving assignment of specific administrative functions to each city commissioner; (2) Charleston, South Carolina (June 14, 1977), involving a transfer of taxing powers from the county legislative delegation to the county council; (3) Edgefield County, South Carolina (February 8, 1979), involving a transfer of substantial powers from the county legislative delegation to the county council; (4) Waycross, Georgia (February 6, 1988), involving changes in the power and duties of the mayor; and (5) San Patricio, Texas (May 7, 1990), involving the transfer of registration duties from the county clerk to the county assessor.

[4] See Brief for the United States at 15-16, *City of Lockhart* v. *United States*, 460 U.S. 125 (1983); Brief for the United States at 21-27, *McCain* v. *Lybrand*, 465 U.S. 236 (1984); Brief for the United States at 8-10, *Rojas* v. *Victoria Indep. School Dist.*, 490 U.S. 1001 (1989).

emerged separating those transfers of authority that are subject to preclearance from those that are not.

The district court sought to draw such a line in this case by limiting the scope of Section 5 to transfers that involve a "significant relative change" in power between officials who are "elected by, or responsible to, substantially different constituencies of voters." Pet. App. A13-A14. For the reasons set out below, we think the district court's standard cannot be reconciled with Congress's intention to subject to Section 5 review all changes affecting voting with a potential for discrimination. In any event, the question whether the district court applied the proper standard for determining whether a transfer of authority requires preclearance is a substantial and recurring one that merits this Court's plenary consideration.[5] Accordingly, the Court should note probable jurisdiction.

1. Section 5 of the Voting Rights Act of 1965 provides that certain States and political subdivisions, including appellees, may not implement "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" without first obtaining preclearance from the United States District Court for the District of Columbia or the Attorney General. 42 U.S.C. 1973c. To receive preclearance, a covered jurisdiction must show that a proposed change "does not have the purpose and

[5] The question has arisen in *Robinson* v. *Alabama Dep't of Educ.*, 652 F. Supp. 484 (M.D. Ala. 1987) (three-judge court); *Hardy* v. *Wallace*, 603 F. Supp. 174 (N.D. Ala. 1985) (three-judge court); *County Council* v. *United States*, 555 F. Supp. 694 (D.D.C. 1983) (three-judge court); and *Horry County* v. *United States*, 449 F. Supp. 990 (D.D.C. 1978) (three-judge court). In each case, the reallocation was held to be subject to the preclearance requirement.

will not have the effect of denying or abridging the right to vote on account of race, color, or [membership in a language minority group]." *Ibid.*

The procedural question whether a change is subject to preclearance is not the same as the substantive question whether the change should be precleared. In deciding the first question, a court may not inquire into whether the change has a discriminatory purpose or effect. *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. 166, 181 (1985). Instead, the inquiry is limited to deciding whether the challenged alteration has the "*potential* for discrimination." *Ibid.* Moreover, a court may not exempt from preclearance changes that it views as insignificant. The plain langage of the statute makes the preclearance requirement applicable to *any* change with respect to voting, no matter how small or minor. *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 566 (1969). See *Hallstrom* v. *Tillamook County*, 110 S. Ct. 304, 309 (1989) (Courts "are not at liberty to create an exception where Congress has declined to do so.").

Congress intended Section 5 to be applied broadly. The Voting Rights Act defines the terms "vote" and "voting" to include "all action necessary to make a vote effective." 42 U.S.C. 1973*l*(c)(1). The scope of Section 5 is not limited to changes directly affecting the casting of a ballot. This Court has recognized that "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot." *Allen* v. *State Bd. of Elections*, 393 U.S. at 569. See also *Georgia* v. *United States*, 411 U.S. 526, 534 (1973); *Perkins* v. *Matthews*, 400 U.S. 379, 390 (1971). Consistent with this understanding, the Court has held that a change from

single-member districts to at-large voting (*Allen*, 393 U.S. at 560-571), the introduction of numbered posts and staggered terms (*City of Lockhart* v. *United States*, 460 U.S. 125, 131-132 (1983)), reapportionments (*Georgia* v. *United States*, *supra*), and annexations (*Perkins* v. *Matthews*, *supra*) all are subject to preclearance. This Court has thus recognized that a "standard, practice, or procedure with respect to voting" is not limited to the mechanics of voting, but includes how the vote counts and what it is for. In short, the preclearance requirement applies to all changes that affect "the power of a citizen's vote." *Allen*, 393 U.S. at 569.

One type of change that can directly affect "the power of a citizen's vote" is a change in what the official the citizen votes for is authorized to do. For example, a change eliminating all of a county commission's power and making the body purely ceremonial would have the effect of changing the citizen's vote for county commissioners from something of significance to an empty gesture. To cite another example, suppose litigation under Section 2 of the Voting Rights Act resulted in changing the method of electing members of a school board from an at-large system to a single-member district system, and that minority group members then elected one or more officials to the school board for the first time. Suppose further that, immediately following the election, the State transferred taxing and budgetary authority from the school board to a county commission whose members are elected at large. Clearly, this change has the potential to interfere with the power of minority voters to elect the officials who make school funding decisions.

The Court has not yet had occasion to hold that changes in the powers of an elected body are changes

in a "standard, practice, or procedure with respect to voting" requiring preclearance under Section 5. 42 U.S.C. 1973c. The Court has held, however, that a change from a three-member body to a five-member body was a change requiring preclearance, because it changed the voting power of the individual members of the three-member body. *City of Lockhart* v. *United States*, 460 U.S. 125 (1983). As the Court explained in *Lockhart*, "[i]n moving from a three-member commission to a five-member council, [the city] has changed the nature of the seats at issue. * * * For example, [two of the old seats] now constitute 40% of the council, rather than 67% of the commission." *Id.* at 131. If diminishing the power of an individual *member* of an elected body by increasing the size of the body without changing its powers is a change requiring preclearance, it would seem to follow *a fortiori* that altering the power of the commission as a whole would also constitute a change affecting "the power of a citizen's vote." *Allen*, 393 U.S. at 569.[6]

As the above examples illustrate, when a State transfers decisionmaking authority from one body to another, there is a *potential* for discrimination against minority voters. Such transfers are therefore subject to preclearance under Section 5. Should the circumstances of a particular transfer of decisionmaking power be such that there is no *actual* discrimination, the change will be precleared.

[6] In *McCain* v. *Lybrand*, 465 U.S. 236 (1984), state legislation changed the governing body of a county from an appointed commission to an elected council with increased legislative powers. The parties stipulated that this legislation incorporated changes with respect to voting, and the Court therefore was not required to address the issue. The Court nevertheless noted that "several changes are suggested," including "the basic reallocation of authority from the state legislative delegation to the Council." *Id.* at 250 n.17.

2. The district court correctly recognized that transfers between officials with different voting constituencies can create the potential for discrimination, since "identifiable racial or ethnic groups of voters will often have different levels of voting strength in different constituencies." J.S. App. A14. The court concluded, however, that transfers between officials with the same constituency are so unlikely to discriminate against minority voters that preclearance is not required. *Ibid.*

The district court erred in concluding that transfers of authority between officials who serve the same constituency have no discriminatory potential. Suppose, in the school board example above, that the school board and the county commission both are elected at large by all residents of the county, but that single-shot voting is permitted in school board elections.[7] If minority voters are able to concentrate their voting strength and elect a candidate they favor to the school board, and funding authority is then transferred to the county commission, the transfer is potentially discriminatory.

Our disagreement with the district court's "different constituency" rule is by no means academic. On at least two occasions, the Attorney General has objected to transfers of authority between officials serv-

[7] Single-shot voting is possible where candidates compete for more than one vacancy. A minority group can increase the likelihood of electing a candidate it favors by voting only for him. If the rest of the electorate splits its vote among a number of candidates, the minority-favored candidate may win. See *City of Rome* v. *United States*, 446 U.S. 156, 184 n.19 (1980).

ing the same constituency. In one case (Mobile, Alabama, March 26, 1976), a three-member commission elected at large transferred administrative responsibilities exercised by the entire commission to individual members of the commission. Our investigation disclosed that the purpose of this transfer was to forestall any possibility of a change to single-member districts (on the ground that it would be inappropriate to permit one area of the city to elect an official with city-wide responsibility). In another case (San Patricio, Texas, May 7, 1990), the Attorney General objected when a county transferred the authority to register voters from the county clerk to the county tax assessor, both of whom are elected at-large by the entire county. Our investigation revealed that the purpose of the change was to retaliate against the county clerk for cooperating in a Section 5 review of an unrelated voting change. These objections further demonstrate that the district court's "different constituency" test too narrowly defines the circumstances under which preclearance should be required.

The district court's "different constituency" rule is also inconsistent with *Lockhart*. As discussed above, this Court held that the transfer of power from a three-member body to a five-member body was covered by Section 5, even though both bodies served the same voting constituency. See also *Horry County* v. *United States*, 449 F. Supp. 990, 993-995 (D.D.C. 1978) (three-judge court) (transfer of administrative functions from chairman elected at-large to administrator appointed by Council elected at-large is a covered change).

In addition, the district court's approach blurs the basic distinction between the procedural question whether a change must be submitted for preclearance and the substantive question whether the change

should be precleared. This Court's decision in *Perkins* v. *Matthews*, *supra*, illustrates the difference between the two inquiries. In *Perkins*, the district court held that a jurisdiction's annexation did not have to be precleared because blacks still constituted a majority of voters after the annexation. 400 U.S. at 385-386. Similarly, the court did not require the jurisdiction to preclear a change from single-member districts to at-large elections because blacks would retain the power to elect the candidates of their choice in at-large elections. Finally, the district court held that changes in the location of polling places did not require preclearance since the changes were dictated by necessity. This Court reversed, holding that the district court effectively had inquired into the *merits* of whether the changes had the purpose or effect of discriminating against minority voters—a function reserved for the Attorney General and the United States District Court for the District of Columbia. *Ibid.* The Court explained that annexations, changes to at-large election systems, and changes in polling places are practices that can, in particular cases, discriminate against minority voters. Accordingly, this Court held that all such changes must be precleared. 400 U.S. at 387-394.

That analysis applies here. A transfer in decision-making authority is a practice that can, in particular cases, discriminate against minority voters. Accordingly, all such transfers must be submitted for preclearance, including those that appear innocuous. A showing that the officials serve the same constituency may be persuasive evidence that a particular transfer is without a discriminatory purpose or effect and therefore should be precleared. But such a showing does not eliminate the potential for discrimination,

and so cannot justify exempting all same-constituency transfers from Section 5 review.

For this reason, the district court erred in holding that the transfer of authority in Russell County did not require Section 5 review. Decisionmaking authority over road matters was transferred from individual commissioners elected at large from residency districts to the county engineer, who is appointed by the Commission. This transfer of authority requires preclearance under Section 5. The fact that all these officials ultimately are answerable to all the voters of Russell County, and the State's public policy reasons for the transfer, would support appellee's argument in favor of preclearance once the change is submitted. But those facts do not obviate the need for preclearance.[8]

3. We also disagree with the district court's holding that transfers of decisionmaking authority that can be characterized as relatively unimportant need not be precleared under Section 5. The district court concluded that such transfers do not require preclearance because they do not have "a significant potential impact on voting rights." J.S. App. A14. But as we noted above, p. 10, *supra*, the preclearance requirement is not limited to those changes with a "significant" impact on voting rights. On the contrary, the language of the statute makes the preclearance requirement applicable to *any* change with respect to voting, no matter how minor. *Allen* v. *State Bd. of Elections*, 393 U.S. at 566.

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[8] In the past two years, the Attorney General has reviewed over 40 requests for preclearance of changes from district to unit systems of road work. Thus far, the Attorney General has approved all of these requests.

To be sure, certain transfers of authority do not affect voters *at all*, and therefore need not be submitted for preclearance. In particular, there are certain housekeeping and ceremonial duties that may be of interest to the officeholder, but which do not concern voters. In general, only the transfer of a representative's decisionmaking power implicates voters. See Brief for the United States at 10-12, *Rojas* v. *Victoria Indep. School Dist.*, *supra* (arguing that school board's agenda preparation policy was not subject to the preclearance requirement because it did not shift any decisionmaking power). If a transfer involves decisionmaking power, however, it cannot be dismissed as having no effect on voting simply because the particular decisionmaking power at issue seems less important than other duties of the office. When minority voters lose the power to use their vote to affect a governmental decision, their voting power has been diminished. That they retain the power to influence what a court may regard as more important matters does not redeem that loss.

A test that turned on the relative importance of a particular decisionmaking power would be difficult to administer. In many cases, the Department of Justice would find it necessary to conduct an extensive investigation simply to determine whether a change is subject to preclearance. A covered jurisdiction would face a similar burden in deciding whether it is required to submit a change for preclearance in the first instance. Even after investigation, it might not be clear on which side of the line a particular change falls. What is important to some voters may not be to others. If the road to a voter's home is one the voter's commissioner would schedule for paving but the county commission as a whole would not, the

transfer of authority to set road work priorities from the former to the latter may be—to that voter—an important change indeed. For these reasons, the district court's standard would invite litigation in every Section 5 case to determine the question of coverage. This would not be consistent with the purpose of the preclearance provisions "to provide a speedy alternative method of compliance to covered States." *Morris* v. *Gressette*, 432 U.S. 491, 503 (1977).

Our concerns are not limited to practicality. The district court's standard would also threaten the prophylactic purpose of Section 5 by permitting covered jurisdictions to decide whether a transfer of authority is sufficiently important to require preclearance. See *McCain*, 465 U.S. at 246 (Section 5 must be interpreted "in light of its prophylactic purpose and the historical experience which it reflects").

For these reasons, the district court erred in holding that the Etowah common fund resolution did not require preclearance. That resolution removed the power of individual commissioners to decide which road projects in their districts would receive priority. Consequently, it involved a transfer of decisionmaking power concerning "the most important aspect of county governance" (J.S. App. A20) from one set of officials to another. See Ala. Code § 23-1-80 (1975 & Supp. 1990) (principal responsibility of county commissions is to maintain roads and bridges). While the power to set internal priorities may not be as important as the power to determine overall funding for a district, voters have an interest in how both functions are performed.

The Etowah common fund resolution was passed while the Commission was undergoing a transition from an at-large system to single-member districts. Such a change might well call for and justify a real-

location of decisionmaking authority. Good government considerations could call for different allocations of powers depending on whether members of an elected body serve specific districts or at large. At-large members may, for example, be expected to have the concerns of the entire county in mind in setting priorities, while members serving only a specific district might have more parochial concerns. But the facts of the Etowah County case illustrate why any such justifications should be examined through the preclearance process. As a result of the common fund resolution, individual commissioners were stripped of their power to determine district funding priorities almost immediately after minority voters were able to elect a commissioner of their choice for the first time. It is hard to imagine a case that more clearly calls for Section 5 review.[9]

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[9] In No. 90-712, appellants contend (J.S. 4-6) that a change with no potential for discrimination at the time it is implemented (and therefore not subject to preclearance), may nevertheless become subject to preclearance at a later date if subsequent changes create a potential for discrimination. In our view, the changes at issue in this case were subject to the preclearance requirement at the time they were made. Accordingly, the Court need not reach this additional question. But if the Court were to reach this question, the position of the United States is that a change not subject to preclearance at the time it is implemented may not thereafter become subject to preclearance because of subsequent, unanticipated changes. The rule appellants argue for is not derived from the language or legislative history of Section 5, and would impose an unwarranted degree of uncertainty on State and local governments. Of course, efforts to evade the preclearance requirement by implementing a covered change in two or more steps are subject to preclearance. In addition, if a covered jurisdiction fails to submit a change that is subject to preclearance, and the Department of Justice thereafter reviews

CONCLUSION

This Court should note probable jurisdiction in both cases.

Respectfully submitted.

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the change, it will consider intervening developments in determining whether to interpose an objection. See *City of Rome* v. *United States*, 446 U.S. at 186.

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